PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1117

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST,

Petitioners,

versus

FRANK ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TED M. KERR
P. O. Drawer 511
Midland, Texas 79701

WM. MONROE KERR
P. O. Drawer 511
Midland, Texas 79701

Counsel of Record
for Petitioners

KERR, FITZ-GERALD & KERR
111 Midland Tower Building
Midland, Texas 79701

OF COUNSEL

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST,

Petitioners,

versus

FRANK ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TO: THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners ("Condor") respectfully seek a writ of certiorari to review the judgment and opinion in this case of the Temporary Emergency Court of Appeals of the United States.

I. OPINIONS OF THE COURTS BELOW.

The trial court, the United States District Court for the Western District of Texas, by document that might be considered an unreported opinion, granted to Condor a preliminary injunction to prevent enforcement of Federal Energy Administration Remedial Order requiring Condor to sell certain crude oil production to Phillips Petroleum Company (the Preliminary Injunction is appended hereto as Appendix "A"). The trial court subsequently certified a substantial constitutional question to the Temporary Emergency Court of Appeals which is also unpublished (Appendix "B" appended hereto). The opinion of the Temporary Emergency Court of Appeals is reproduced as Appendix "C" hereto and is reported in ____ F. 2d ____.

II. JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed, reproduced as Appendix "D" hereto, was entered on February 7, 1975. The statutory provision believed to confer on this Court jurisdiction to review the judgment is Section 1254 of Title 28, United States Code, as it has been incorporated by reference in Section 211(g) of the Economic Stabilization Act of 1970, Public Law 91-151, 83 Stat. 377, as amended by Public Law 92-210, 85 Stat. 743, and by Public Law 93-28, 87 Stat. 27, which, in turn, is incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Public Law 93-159, 87 Stat. 627.

III. QUESTION PRESENTED.

Whether the Congress of the United States, pursuant to the Emergency Petroleum Allocation Act of 1973, and the Federal Energy Administration and its Administrator, pursuant to Regulation 211.63 adopted under the Act, have the power and right, under the Fifth Amendment to the Constitution of the United States, to require an owner of property, Condor Operating Company, to sell its property to another, Phillips Petroleum Corporation, for the benefit and to the financial advantage of Phillips. (As certified to the Temporary Emergency Court of Appeals by the trial court).

IV. THE CONSTITUTIONAL PROVISION INVOLVED AND THE REGULATION UNDER ATTACK.

1. The Constitutional Provision: The Due Process Clause of the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ., *nor be deprived of life, liberty or property, without due process of law*; . . .

2. The Regulation Under Attack: Federal Energy Administration Regulation Section 211.63(a) of Title 10, Code of Federal Regulations, 39 FR 35472, October 1, 1974:

All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program: provided, however, that (1) any such supplier/purchaser relationship may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to the first sale of crude oil pursuant to Section 210.32 of this chapter [exempt "stripper well" oil]; and (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser.

V. STATEMENT OF THE CASE.

The trial court's jurisdiction of this case is conferred by Section 211 of the Economic Stabilization Act of 1970, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973.

Petitioners own oil and gas leases covering undivided interests in lands in Ector County, Texas, with two other parties, one of which is Phillips Petroleum Company ("Phillips"). Condor is is the operator under longstanding Operating Agreements to which Phillips is a party and which allow the owners at any time to take their respective shares of oil in kind. At December 1, 1973, Condor, as operator, was selling all

of the production from the property to Phillips. After December 1, 1973, Condor began to take its share of production in kind to refine the same in the United States into petroleum products which it marketed to ultimate users in the United States, in compliance with the price control laws applicable thereto. Condor's crude oil is a fairly unique "lube" crude which under Federal Energy Administration price controls, on first sale, may be sold for not more than $5.28 per barrel. According to the advice of Phillips in the record, replacement oil of this type would cost $12.25 per barrel f.o.b. United States Gulf Coast. Federal Energy Administration cited Condor for thus taking and using its owned crude oil as a violation of its Regulation 211.63(a). After administrative hearings, Federal Energy Administration issued its remedial order that:

> "Condor shall supply Phillips with the volumes of crude oil Phillips was receiving under contract on December 1, 1973. This shall be interpreted to mean that any exercise by Condor of its contractual option to take in kind the volumes Phillips was purchasing on December 1, 1973, would not be effective to divert the flow of crude oil from Phillips under Section 211.63."

Condor has exhausted fully the administrative remedies available to it to attack the remedial order, and thereby this case became one for the judicial review of the remedial order.

VI. REASONS FOR GRANTING THE WRIT.

Regulation 211.63(a) positively forces some private owners of privately owned property, including Petitioners, to sell that privately owned property to other private persons, against their will and without in any way allowing the owner to keep, or use, or otherwise enjoy the same, or any part thereof. This is beyond the powers, expressed or implied, delegated to legislative and executive branches of American government, state or federal, as has been proclaimed, time and again, by the courts, including this Court. In the cases, the offenders have been States, their subdivisions and arms thereof, such as utilities, which, from time to time, cast covetous eyes on the property of others. Through all of our historical crises, and all of our wartime material shortage and allocation programs, the United States never before has attempted to ignore these limitations on its power. The first federal effort in this direction is that of Respondents' in the adoption of regulations under the Emergency Petroleum Allocation Act of 1973, and in the enforcement of the same against Petitioners. Now, for the first time, the United States has a clear scheme of regulation that directly forces sales of privately owned property to other private citizens, against the will of the owner. Perhaps it is even more profound that the United States adopts a scheme of regulation which commands private citizens what, when and on what terms private citizens positively will act with their private property. Historically, schemes of regulation of private citizens extended only to limiting, restricting or prohibiting conduct, while otherwise leaving the citizens free to make their own choices.

The Temporary Emergency Court of Appeals, in adopting the Regulation under attack, clearly implies that since 1937, under the rulings of this Court, the implied powers of government over the private property of private citizens are great enough to force the unwilling to sell their private property to other private citizens, and that somehow, since 1937, the authorities to the contrary have become inoperative. The court below also saw no substantive difference between policelike power to tell citizens what they cannot and must not do with their property, and power positively to order citizens to do this, that or the other with their property. The Emergency Court of Appeals in its opinion has further expressed the belief that an otherwise constitutionally protected right of one person in respect of his property may be subordinated to the great national purposes, at least if an emergency is declared by Congress, or for a relatively short period of time.

None of these concepts comport with our constitutional law as it has been written to date. The issues raised affect Petitioners and various other independent oil producers, and if resolved in favor of the existence of the disputed power, may be anticipated to affect various others who from time to time may become subject to this type of Regulation.

VII. ARGUMENT.

Cases of this Court holding that under the due process clause of the Fourteenth Amendment to the Constitution, the legislative and executive branches of government may not require one private citizen to

sell his privately owned property against his will to another private citizen include: *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Missouri Pacific R. Co. v. Nebraska*, 217 U.S. 196 (1910); *Great Northern R. Co. v. Minnesota*, 238 U.S. 340 (1915); *Great Northern R. Co. v. Cahill*, 253 U.S. 71 (1920); *Delaware L. & W. R. Co. v. Morristown*, 276 U.S. 182 (1928); *Chicago St. P. M. & O. R. Co. v. Holmberg*, 282 U.S. 162 (1930); *Citizens Savings and Loan Association v. Topeka*, 20 Wall. 655 (1875); *Cole v. La Grange*, 113 U.S. 1 (1885); *Myles Salt Co. v. Ibernia & St. M. Drainage District*, 239 U.S. 478 (1916); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937); *Lake Shore and Michigan Southern Railway Company v. Smith*, 173 U.S. 684 (1899); *Ochoa v. Hernandez E. Morales*, 230 U.S. 139 (1913); *Eubank v. Richmond*, 226 U.S. 137 (1912); *Fallbrook Irr. District v. Bradley*, 164 U.S. 112 (1896); *Murray v. Hoboken Land, etc., Co.*, 18 How. 272 (1856); and *Wilkinson v. Leland*, 2 Pet. 627 (1829). Please see also *16 Am. Jur., Constitutional Law*, Section 544, p. 935 (12 C.J., Constitutional Law, Section 1042, p. 1252; 16 C.J.S., Constitutional Law, Section 209, p. 1048, et seq.; and 16 C.J.S., Constitutional Law, Section 599, p. 695, et seq.). The effect of the Fifth Amendment of the Constitution to limit the modes of exercising power by the federal government should be the same. The power of the judicial branch of government to afford adequate remedies at law or in equity, of course, stands on a different power base. Likewise, the power of government over governmental agencies, officials and employees, and over arms or extensions of government, such as government owned corporations, common carriers, and utilities, may be different from power over private citizens and their private property.

In the Temporary Emergency Court of Appeals. Respondents conceded, correctly, that the power underlying the adoption of Regulation 211.63(a) does not stem from the implied power of eminent domain. The reason for this concession may have been that Petitioners are forced to sell their oil at $5.28 per barrel, at a time when replacement oil would cost $12.25 per barrel.

Petitioners have conceded that were they going to sell their oil, they could probably be lawfully restricted by regulation to selling it to their historical purchaser. Petitioners would also concede that Federal Energy Administration, by regulation, can restrict or limit the uses which owners may make of their property, the quantities they could produce, the quantities they could refine, the quantities they could sell, the minimum quality standards they must meet if they are to sell, and under price controls, either the minimum or maximum price at which they might sell. Petitioners also concede that there are probably innumerable other things that the government, by regulation, could tell them they could not do with their property, as long as the owners are left some substantial freedom to otherwise use and enjoy it.

Petitioners do not challenge, and in the courts below have not challenged, the federal power to abrogate contracts.

In the court below, Respondents' claim of constitutional power rested on a concept that the national government may do whatever is needful for the great national purposes that identify this country's adjust-

ment to change and ultimate survival, citing Judge Leventhal in his opinion in *Amalgamated Meat Cutters and Butchers Workers v. Connally*, 337 F. Supp. 737, 752 (U.S. D.C. D.C., 1971), aff'd 497 F. 2d 1360 (TECA. 1974), writing on the subject of undue delegation of legislative authority in relation to the Economic Stabilization Act of 1970, Pub. L. 91-151, 83 Stat. 377.

Petitioners recognize that in 1937, this Court, in some respects, altered its prevailing view concerning the scope of the commerce clause of the Constitution, to authorize, in effect, federal legislation in fields that formerly had been held by this Court to be subject only to state regulation. Nothing of which we are aware, however, happened in 1937, or has happened since, which would materially lessen the extent of protection afforded by the Fifth Amendment to persons in their ownership of private property, as was thought by the Temporary Emergency Court of Appeals. Likewise, we are aware of nothing that enlarges the means and modes available to the government to exercise powers delegated to it in the Constitution. It is only since 1937, perhaps, that Petitioners' activities would have been thought to be lawfully subject to federal regulation.

The power to regulate commerce among the States is not a power to do anything the government, or an agency or official thereof, might choose to do, at least not since the adoption of the Bill of Rights as amendments to the Constitution. With the Bill of Rights, everything done in the regulation of commerce must comport with due process of law as guaranteed by the Fifth Amendment.

Due process of law has been historically measured by this Court, case by case, and, as a consequence, there is no precise definition or measure of due process. Looming large in the due process decisions are ideas about what is and what is not traditional and accepted practice, expressed thoughts of our founding fathers, historical developments in our country, as well as in others, thoughts about freedom and free men, the evils of other governmental systems, the beliefs in what a free people would and would not delegate to government and what they consequently did and did not so delegate, and beliefs in what a free people would and would not tolerate in government, among other considerations.

By whatever it is that due process of law may be measured, this Court has never held that it is consistent with due process of law for either the legislative or executive branches of government to compel one private citizen to sell his privately owned property to another private citizen against his will, or, otherwise to compel private citizens affirmatively to act with respect to their privately owned property precisely as the government says that they will. Throughout our history, in the exercise of police and policelike powers, government has proscribed, prohibited and restricted the acts of the people, but never have the executive and legislative branches been allowed lawfully to command and to dictate that which private citizens will do with their lives and property. It is one thing to make it unlawful for a person to do various things, while otherwise leaving him free to do that which is not unlawful, and another to command action without leaving the recipient any choice in the matter.

Even in wartime and under war powers, when faced with the threat of destruction of our very national existence by forces from without, and with the most severe and critical material shortages at hand, the government never took it upon itself to order private citizens to act in any particular way, though the temptation to do so must surely have been strong on several occasions. The reason that it did not, we submit, is because the Bill of Rights would have rendered such actions unlawful, and the independent judiciary would have promptly stricken the same.

The Temporary Emergency Court of Appeals thought that *Block v. Hirsch*, 256 U.S. 135 (1921), which was uncited by any party in the courts below, controls these issues. The *Block* case legislation involved was a District of Columbia temporary emergency rent control law adopted after World War I. The legislation specifically allowed the owner of rent property to retake if for his own use or for that of his wife, children or dependents. Otherwise, it allowed tenants to hold over after the expiration of their leases on paying the maximum rent permitted by law. Petitioners, on the other hand, are being forced to sell and forever dispose of their oil to another private person. Petitioners are not being restricted merely in the use to which they may put their oil. On complying with the regulation and remedial order issued thereunder, Petitioners' oil is gone forever.

The *Block* decision is certainly to be considered along with the due process cases that have heretofore been decided, but it does not and should not be considered as controlling, overriding, or overruling the

cases holding there to be no lawful power to force a private citizen to sell his privately owned property to another private citizen, such as those hereinabove cited by Petitioners. Three of these cited cases post-date the *Block* decision. In one of the later cases, *Delaware L. & W. R. Co. v. Morristown*, 276 U.S. 182 (1928), Mr. Justice Holmes and Mr. Justice Brandeis, both of whom were in the majority in the *Block* decision, in a concurring opinion, expressly recognized the validity of the rule for which Petitioners contend. Mr. Justice Holmes and Mr. Justice Brandeis were also members of the unanimous Court deciding *Chicago St. P. M. & O. R. Co. v. Holmberg*, 282 U.S. 162 (1930). The third case, *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), was also decided by a unanimous Court, which included Mr. Justice Brandeis.

The matter of legislation by prohibition and restriction versus affirmative governmental demand, as submitted, has formed the basis for upholding or denying price control laws, material allocation laws, collective bargaining, minimum wage controls, railroad car assignment regulations, and other legislation, both before and since 1937. Valid legislation and regulation on these subjects, and others, were merely inhibitory and prohibitory and not affirmative and in some of the cases, these were said to be critical distinctions. See for example *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1, 30, 45 (1937), and the *Assigned Car Cases*, 274 U.S. 564, 573, 575 (1927), opinion by Mr. Justice Brandeis, for a unanimous Court which included Mr. Justice Holmes. The significance of these distinctions did not disappear from constitutional jurisprudence when Mr. Chief Justice Hughes altered his views about the com-

merce clause in 1937 or when Mr. Justice VanDeventer retired in 1937, or by virtue of any decisions of the courts since that time.

Petitioners recognize that under valid governmental regulations, some people may be more adversely affected than others, and that such does not necessarily render the regulation invalid. This is not to say, however, that a regulation may lawfully defeat a constitutionally protected right of a person, no matter how otherwise perfect or desirable the scheme of regulation, as the Temporary Emergency Court of Appeals implies. If one's rights guaranteed by the Bill of Rights are infringed by the regulation, the regulation is unenforceable, at least as it would so infringe upon constitutionally protected rights of the offended person. It is not a problem of balancing the national good against the relative unimportance of a constitutionally protected right of a single citizen or a small group of citizens, to determine which will survive. Were it not so, there would be no practical constitutional guarantees, because initially, at least, the greater public good always could be said to outweigh the effect of violation of the constitutionally protected rights of one person or but a relatively few persons. Especially is this so when legislative acts and executive regulations are clothed with the aura and mantle of perfection with which the courts and private citizens cannot be expected to cope.

The Temporary Emergency Court of Appeals thought it important that Congress had declared an emergency, and that the emergency legislation was initially to be effective for but a term of months, suggesting that constitutionally protected guarantees

become subservient to the greater public good during emergencies or for relatively short periods of time. This thought is contrary to the Bill of Rights and the reasons for its existence and the reasons for its content, and is not supported by any actual court holdings of which we are aware.

The Emergency Petroleum Allocation Act of 1973 does not itself compel private citizens to sell their private property against their will to another private citizen. The forced sale of private property stems strictly from regulations such as Section 211.63(a). Even that regulation is salvageable if it is interpreted to mean that it applies only to those who choose to sell production. There are undoubtedly many producers who have no desire to use their production themselves and who are going to sell it in any event. In that case, as Mr. Justice Holmes suggests in the *Block* case, there probably is no constitutional impediment to restricting eligible purchasers to the historical purchaser, if the historical purchaser is willing to buy it.

Even were the entire regulation section to be declared invalid because of its encroachment on constitutionally protected rights, such would not prevent FEA from performing the full functions delegated to it by Congress in the Emergency Petroleum Allocation Act of 1973. Under the Act, FEA has available to it the whole range of permissible modes of regulation, including those employed during World War I and World War II, under our most extensive allocation acts adopted under the war power enactments. FEA has no mandate from Congress to adopt rules or regulations which depart from the traditional and accepted modes of regulation. FEA has no command from Congress to

pioneer new concepts in how to go about the business of regulating. FEA can still get its job done in just the way that Congress and the agencies of government found that they could get the job done in the 1930's, by means of prohibitions, inhibitions, and limitations, rather than by affirmative dictation. It can achieve its great aims as well as it otherwise could without destroying the ideals that, under the Bill of Rights, we are a free people possessed of sacred rights to own and enjoy private property, including the right to sell it to other private citizens only when the owner may choose to do so.

CONCLUSION

FEA (FEO), on its own motion, has broken with historical and traditional concepts of how the power to regulate lawfully may be effected to embark on a program of forced sales of private property to other private citizens against the will of the owners thereof. This, and its necessary implications, deserves the very careful scrutiny of this Court, and we submit, after full consideration, the Court's repudiation.

Respectfully submitted.

TED M. KERR
P. O. Drawer 511
Midland, Texas 79701

WM. MONROE KERR
P. O. Drawer 511
Midland, Texas 79701

Attorneys for Petitioners

KERR, FITZ-GERALD & KERR
P. O. Drawer 511
Midland, Texas 79701
OF COUNSEL

APPENDIX "A"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST

v. Civil No. MO-74-CA-77

JOHN C. SAWHILL, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION

ORDER

Filed: Sept. 26, 1974

On this 23rd day of September, 1974 came on to be heard the above entitled and numbered cause and came the parties in person and by their Attorneys of Record and announced ready for trial. It appearing to the Court that, except for the evidence adduced on a full hearing of this matter, all pertinent and relevant facts have been stipulated to by the parties and it was agreed that the Court could hear and decide the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. After hearing all the stipulations of the parties and the evidence adduced by the plaintiffs, the Court is of the opinion and finds that the law and the facts are with the plaintiffs and that plaintiffs are entitled to the Temporary Restraining

Order and Preliminary Injunction enjoining defendants from in any manner attempting to enforce the August 12, 1974 Remedial Order until such time as this matter may be heard by the Temporary Emergency Court of Appeals. It further appears to the Court that properly, constitutionally and lawfully construed, plaintiffs have not violated Section 211.63 of such Regulation of the defendants and plaintiffs may not legally and constitutionally be mandatorily enjoined and required to sell to Phillips Petroleum Company the crude oil which plaintiffs have elected under their contract with Phillips to take and own in kind and who now desire to refine products for marketing for plaintiffs' own account. It is also the opinion of this Court and the Court finds that under Regulation 211.63 of Title 10, Code of Federal Regulations, which was adopted under the provisions of the Emergency Petroleum Allocation Act of 1973, that a supplier/purchaser relationship exists between Phillips Petroleum Company and plaintiffs within the meaning of the Regulation; that at all times pertinent hereto it has been in full force and effect and the Regulation was not intended or meant to prevent plaintiffs from using their own private property in an effort to alleviate the domestic emergency crisis except that plaintiffs are limited to a sales price of said oil and gas in kind to any purchaser for a sum in its unrefined crude state not to exceed $5.28 per barrel. Under the contract existing between plaintiffs and Phillips Petroleum Company, the plaintiffs have the express continuing written consent of Phillips Petroleum Company to take plaintiffs' crude oil in kind and to refine and market products derived therefrom or to use such oil in any way it sees fit and there can be no requirement under the Act or Regulations promulgated thereunder or pursuant thereto that would in any manner require plaintiffs to

mandatorily *produce, market* and *sell* its oil in kind to any one particular individual purchaser exclusively, including Phillips Petroleum Company. Further, this Court is of the opinion and finds that such injunctive relief should be granted based upon the invalidity of the Remedial Order which was promulgated under the Regulation because such Remedial Order, as it applies to the particular Regulation in question, is arbitrary, unreasonable, discriminatory, capricious, is further contrary to Congressional mandate, and is wanting in statutory authority. If the Remedial Order correctly construes the Regulation, a serious and substantial constitutional question arises that must be certified to the Temporary Emergency Court of Appeals for determination of the appropriate manner of disposition of this case, related issues, the constitutionality of the Act itself, the Regulation promulgated thereunder and the Remedial Order which is attacked herein. Pending such certification, the Court finds that the plaintiffs have suffered irreparable injuries as shown by the evidence in this case that can be alleviated only through the issuance of a Restraining Order and Preliminary Injunction to restrain in effect the actions of the Administrator pending the disposition of the Temporary Emergency Court of Appeals of such determination or the further orders of the Temporary Emergency Court of Appeals.

It is, therefore, accordingly ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs' application and petition for a Preliminary Injunction shall remain in effect until such time as the Temporary Emergency Court of Appeals either orders that the Preliminary Injunction be in all things made permanent or same is dissolved by the Temporary Emergency Court of Appeals after a full determina-

tion of all the issues in this case, including the constitutional ones which are certified to the Temporary Emergency Court of Appeals for final determination. The Preliminary Injunction shall issue in favor of plaintiffs ordering defendants to refrain and cease from interfering with plaintiffs in receiving the petroleum products in kind upon the execution by plaintiffs in favor of defendants of a Surety Bond in the sum of FIFTEEN THOUSAND AND NO/100 DOLLARS ($15,000.00). Defendants are hereby preliminarily enjoined from in any manner attempting to enforce the August 12, 1974 Remedial Order until such time as this case and all issues asserted and raised herein shall be heard and determined by the Temporary Emergency Court of Appeals, and this Order is immediately appealable to such Honorable Court.

The Court also finds and holds that the plaintiffs have in fact exhausted all administrative appeals for relief and remedies that are available to them and that the plaintiffs have no adequate remedy at law, and no substantial harm or damage will be sustained to the public interest by the granting of this Preliminary Injunction, and all relief sought by any of the parties to this action which is not herein granted shall be expressly DENIED.

SIGNED AND ENTERED this 26th day of September, 1974, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST

versus C.A. No. MO-74-CA-77

JOHN C. SAWHILL, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION

ORDER AND CERTIFICATE

Filed: Oct. 3, 1974

Pursuant to the order granting Plaintiffs a preliminary injunction on September 26, 1974, the Court makes the following findings:

(a) The Plaintiffs herein are the Condor Operating Company and its joint venturers, James E. Hall, Charles L. Hall, and Frost National Bank and James E. Hall as co-trustees of the Richard A. Hall Trust.

(b) The Defendants herein are the Federal Energy Administration and its Administrator, John C. Sawhill.

(c) Plaintiffs alleged in their Complaint that a Remedial Order entered by the Federal Energy Administration on August 12, 1974, requiring Condor Operating Company to sell certain crude oil production to Phillips Petroleum Corporation was invalid because Condor Operating Company had not violated the provisions of Regulation 211.63 of Title 10, Code of Federal Regulations; which Regulation formed the basis for the Remedial Order.

In its order, the Court basically agreed with Plaintiffs, and found Condor Operating Company to be in compliance with Regulation 211.63, concluded the Remedial Order to be invalid and granted a preliminary injunction ordering Defendants to refrain from interfering with Plaintiffs in taking their oil production in kind.

(d) If, however, the Temporary Emergency Court of Appeals finds this Court to be in error in holding that Condor Operating Company was not in violation of Regulation 211.63, then a substantial constitutional question exists concerning the power of the United States of America to require an owner of property to sell said property to another private party for the latter's benefit.

It is, therefore, ORDERED:

1. The following issue is certified to the Temporary Emergency Court of Appeals:

> Whether the Congress of the United States, pursuant to the Emergency Petroleum Allocation Act of 1973, and the Federal Energy Ad-

ministration and its Administrator, pursuant to Regulation 211.63 adopted under the Act, have the power and right, under the Fifth Amendment to the Constitution of the United States, to require an owner of property, Condor Operating Company, to sell its property to another, Phillips Petroleum Corporation, for the benefit and to the financial advantage of Phillips.

2. This Court urges the Temporary Emergency Court of Appeals to resolve all outstanding issues between the parties pursuant to Section 211(c) of the Economic Stabilization Act of 1970 as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973.

3. The Clerk of this Court shall transmit a certified copy of this Order and Certificate to the Clerk of the Temporary Emergency Court of Appeals of the United States.

ENTERED this 3rd day of October, 1974, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

SLIP OPINION

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 5-10 and 5-11

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST,

Plaintiffs-Appellees,

versus

JOHN C. SAWHILL, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION,

Defendants-Appellants.

ON CERTIFICATION OF A SUBSTANTIAL CONSTITUTIONAL ISSUE BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, MIDLAND-ODESSA DIVISION, AND SUBSEQUENT APPEAL

William M. Kerr, Midland, Texas (Ted M. Kerr and Kerr, Fitz-Gerald & Kerr with him on the brief) for Plaintiffs-Appellees.

Marvin L. Coan, Atty. Dept. of Justice, Washington, D.C. (Carla A. Hills, Asst. Atty. Gen. and Stanley D. Rose, Atty. Dept. of Justice, with him on the brief) for Defendants-Appellants.

Before CHRISTENSEN, ESTES and JOHNSON, Judges.

CHRISTENSEN, Judge.

This case was initiated in the district court by a complaint praying for a temporary restraining order and preliminary and permanent injunctions to prevent enforcement by the Federal Energy Administration (FEA)[1] of a Remedial Order requiring Condor Operating Company and its joint venturers, plaintiffs-appellees herein (Condor), to sell certain crude oil production to Phillips Petroleum Corporation (Phillips).[2] It was alleged that the Remedial Order was invalid because Condor had not violated the provisions of section 211.63(a)[3] of Title 10, Code of

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1 The Federal Energy Office became the Federal Energy Administration ("FEA") on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974 (Pub. L. No. 93-159) and will be referred to herein as "FEA".

2 "Accordingly, FEA has concluded that a violation of 10 C.F.R. Section 211.63 has occurred. Therefore, pursuant to 10 C.F.R. Section 205.86(b), FEA is issuing this Remedial Order. "The Condor Operating Company is hereby ordered to take the following remedial action: Condor shall supply Phillips with the volumes of crude oil Phillips was receiving under contract on December 1, 1973. This shall be interpreted to mean that any exercise by Condor of its contractual option to take in kind the volumes Phillips was purchasing on December 1, 1973, would not be effective to divert the flow of crude oil from Phillips under § 211.63."

3 "(a) All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program: provided, however, that (1) any such supplier/purchaser relationship may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to the first sale of crude oil pursuant to § 210.32 of this chapter [exempt "stripper well" oil]; and (3) the provisions of this

Federal Regulations, upon which it was based and, if it had, that the regulation would have unconstitutionally deprived Condor of property without just compensation and without due process of law.

The trial court granted the preliminary injunction ordering defendants to refrain from interferring with Condor's taking its oil production in kind upon a determination that Condor was in compliance with § 211.63(a), concluded that the Remedial Order was invalid, and certified to this court the constitutional question[4] of whether the government was empowered to require an owner of property to sell its property to another private party, in view of Fifth Amendment protections.[5]

We stayed the injunction below pending our decision on the merits. It was also decided that in addition to the certified constitutional question all other

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paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser."

4 Pursuant to § 211(c) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C.A. § 1904 (1974 Supp.), incorporated into the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, by its § 5(a)(1).

5 The question was certified in the following language: "Whether the Congress of the United States, pursuant to the Emergency Petroleum Allocation Act of 1973, and the Federal Energy Administration and its Administrator, pursuant to Regulation 211.63 adopted under the Act, have the power and right, under the Fifth Amendment to the Constitution of the United States, to require an owner of property, Condor Operating Company, to sell its property to another Phillips Petroleum Corporation, for the benefit and to the financial advantage of Phillips."

matters presented to the district court in support of and in opposition to the application for preliminary injunction ripe for appellate review would be considered.[6] Contemporaneously the defendants filed notice of appeal from the district court's order granting the preliminary injunction.

I. THE PROPRIETY OF OUR EXERCISE OF JURISDICTION BY VIRTUE OF THE CERTIFICATION.

The lower court granted the requested preliminary injunction upon its determination that a proper interpretation of the language of § 211.63(a) itself rendered the Remedial Order invalid. While the point has not been raised directly by any party, we have felt obliged *sua sponte* to inquire into our own jurisdiction and the propriety of its exercise. We were given pause by reference in Condor's reply brief to "the principle of judicial self restraint in avoiding constitutional issue holdings if the merits of the case can fairly be determined without doing so," and its suggestion that the constitutional issue can be so avoided here by upholding the lower court's decision on non-constitutional grounds.

The problem lies deeper, for if there were no substantial constitutional issue properly before the trial court in view of its complete resolution of the application for a preliminary injunction on non-constitutional grounds, it could be questioned under ordinary circumstances whether that issue should

6 § 211(c) of the Economic [illegible]ization Act, *supra*.

have been certified to us at that stage or that the non-constitutional issues should have been hung upon such a certification here. Cf. Shapp v. Simon, ___ F.2d ___ (TECA No. 3-4, Jan. 13, 1975); National Petroleum Refiners Association v. Dunlop, 486 F.2d 1388 (TECA 1973). See also District of Columbia v. Little, 339 U.S. 1 (1950).

The purported appeal by the defendants from the order in question does not ameliorate the problem. They had no appeal as of right from the interlocutory order; they had obtained from the district court no certification for the usual interlocutory appeal, nor had they filed application with this court for leave to so appeal within the time prescribed by § 211(d)(2) of the Economic Stabilization Act with reference to 28 U.S.C. § 1292(b). Thus our jurisdiction rests entirely upon special certification of the constitutional issue by virtue of § 211(c) of the Economic Stabilization Act, *supra*.

Nonetheless, we have concluded that the latter certification justifies our consideration not only of relevant nonconstitutional problems but, to the extent that it thereafter remained significant, the constitutional issue as well. This conclusion has been reached by reason of the pendant nature of the non-constitutional issues, cf. Allee v. Medrano, 416 U.S. 802 (1974), the completeness of the record bearing upon all issues relating to the preliminary injunction, the likelihood that if avoided now they must come back to us later in the same case, because the interpretative questions are so enmeshed here with the constitutional issue as to make complete disposition in order, and the

desirability for prompt resolution in light of circumstances hereinafter discussed. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); District of Columbia v. Little, 339 U.S. 1, 4 n. 1 (1950); *supra;* In Re Brown, 439 F.2d 47 (3d Cir. 1971); Board of Managers of Ark. Tr. Sch. for Boys v. George, 377 F.2d 228 (8th Cir.), *cert. denied,* 389 U.S. 845 (1967).

II. THE CONFLICTING POSITIONS OF THE PARTIES.

Condor and its associated venturers are the owners of undivided interests in certain oil and gas leases in Ector County, Texas, with two other parties, one of which is Phillips. The operating agreement among them has provided since 1948 that the respective working interest owners shall have the right of taking in kind or selling to others their proportionate shares of the oil produced from the leases, a common provision in the industry. The operating agreement permits, but does not require, one working interest owner to sell its share of the production to another working interest owner, a situation Condor says is somewhat unique; most lease agreements, they say, are followed by purchase agreements between the producer and another purchaser, i.e., pipeline or refinery. In this case Phillips is a refiner. We do not see this as a differentiation significant here.

Over a period of many years and continuing until after December 1, 1973, Condor and its predecessors in interest sold their share of production to Phillips under Division Orders. See Thompson v. Thompson, 149 Tex. 632, 236 S.W.2d 779 (1951). Then determining that its profits would be higher if it refined its own crude

oil, Condor began to take its production in kind, thus precipitating the present controversy.

The FEA, as part of its attempt to carry out the purposes of the Emergency Petroleum Allocation Act during the energy crisis, promulgated the regulation in question, designed to prevent during the operation of the program, with limited exceptions not applicable here, the alteration of any supplier/purchaser relationship which existed on December 1, 1973, except upon the consent of both parties.[7] The Remedial Order was issued against Condor to prevent it from altering the disposition of its working interest and thus depriving Phillips of that source of supply.

Condor contends that it did not violate the regulation because in view of its right (option) to take its own crude oil production in kind it never had a binding agreement to sell it, Phillips had none to buy it, and at all times Condor has been entitled at its election to take its production in kind; that Phillips will continue to have available to it any crude oil which Condor may elect to sell rather than to utilize itself, and that if the

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7 Prior to the express "freeze of relationships", FEA on January 14, 1974, issued petroleum allocation regulations (39 F.R. 1924, *et seq.*, Jan. 15, 1974) which by § 211.64(a), provided subject to three exceptions that "all contracts for sales, purchases, and exchanges of domestic crude oil in effect on December 1, 1973, shall remain in effect for the duration of the mandatory allocation program." On January 28, 1974, FEA issued a clarifying amendment to this section making clear that it was the "supplier/purchaser relationships" that had to be maintained. (39 F.R. 3908, Jan. 30, 1974). This section has not been materially changed since then, although as a result of the renumbering of sections which occurred in connection with subsequent amendments to other provisions of the regulations the December 1 rule is now contained in § 211.63(a).

Remedial Order should be held authorized by the regulation both would be unconstitutional because they would command a private citizen to make or produce and then sell private property to another private citizen in violation of due process rights guaranteed by the Fifth Amendment. It is insisted, nonetheless, that the trial court properly construed § 211.63(a) as meaning that Condor is required to sell to Phillips only that crude oil which it would be willing to "sell" to someone, and that it has the continuing "consent" of Phillips under the option provided in the operating agreement to take all or any part of its crude oil in kind, to be refined and marketed as it has arranged to do.

Defendants-appellants contend here, as they did below, that the district court erred in determining that the plaintiffs could, under the operating agreement, exercise their contractual option and take their share of crude oil production in kind notwithstanding § 211.63(a); that the preexisting option conflicts with a legitimate exercise of federal regulatory powers; that the amendment of the regulation prior to any change in the supplier/purchaser relationship rendered clear beyond question that it was that relationship in effect under contracts for sales or purchases on December 1, 1973, rather than merely the foundational contracts which were to remain in effect for the duration of the program; that those relationships could not be altered simply by the exercise of options in existing contracts but required the consent of both parties after the December 1, 1973 freeze, and that plaintiffs are attempting improperly to gain the benefit of exemptions under subdivisions (1) and (3) of § 211.63(a) in the

absence of requisite foundational circumstances.[8] The defendants-appellants contend finally that there is no substantial constitutional question.

A proper resolution of the issues requires more than fragmented consideration of the regulatory provision directly under attack.

III. THE REGULATORY PLAN AND ITS FOUNDATIONS.

The FEA, then the Federal Energy Office as noted in the margin, was established by the President pursuant to Executive Order No. 11748 issued December 4, 1973. There was thereby delegated to the Administrator of FEA all the authority vested in the President by (1) the Emergency Petroleum Allocation Act of 1973 (Pub. L. No. 93-159); (2) Section 203(a)(3) of the Economic Stabilization Act of 1970, as amended (Pub. L. No. 92-210; Pub. L. No. 93-28); and (3) the Defense Production Act of 1950, as amended (50 U.S.C. App. § 2061, *et seq.*), as it related to the production, conservation, use, control, distribution and allocation of energy. The Chairman of the Cost of Living Council delegated further authority to the Administrator under the Economic Stabilization Act of 1970, as amended, in Cost of Living Council Order No. 47 (Dec. 26, 1973), and Cost of

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8 "... (1) [A]ny ... supplier/purchaser relationship may be terminated by the mutual consent of both parties ... and (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser."

Living Council Order No. 47, Amendment 1 (Jan. 30, 1974).

Congress enacted the Emergency Petroleum Allocation Act of 1973, *supra* note 4, which became law November 27, 1973, in response to its findings that shortages of crude oil, residual fuel oil, and refined petroleum products existed or were imminent. These shortages were found to have created or be likely to create "severe economic dislocations and hardships",[9] which would "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare . . ." Congress determined that the best method of averting or minimizing this national threat was to grant to the President of the United States "specific temporary authority" to deal with the shortages and dislocations of crude oil, residual fuel oil and refined petroleum products or dislocations in their national distribution system.[10]

Section 4.(b)(1) established within guidelines of the Act authority, indeed a mandate, for the President or his delegate to provide "to the maximum extent practicable" for

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9 These were stated to include "loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods . . ."

10 As stated by Congress, "The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy."

"(A) protection of public health, safety, and welfare . . . and the national defense;

. . . .

"(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

"(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

"(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

. . . .

"(H) economic efficiency; and

"(I) minimization of economic distortion, in-

flexibility, and unnecessary interference with market mechanisms."

Section 4.(b)(2) of the Act directed the FEA to provide for use of a single date in computing the base prices of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution, and a dollar-for-dollar passthrough of net increased product cost to all marketers or distributors at the retail level. It was further provided in § 4.(c)(1) that the mandatory allocation program for crude oil shall "[t]o the extent practicable and consistent with the objectives of subsections (b) and (d)" result in the allocation of crude oil to each small refiner and each independent refiner in an amount not less than the amount sold or otherwise supplied to such refiner during the corresponding period of 1972 — adjusted to provide for the aggregate shortfall, if any, in total crude supplies over 1972 levels.

The record contains a summarization of the reasons FEA, after coordination with the Cost of Living Council and the oil policy group in the Treasury Department and consultation with major industry trade associations, concluded that it should maintain all supplier/purchaser relationships in effect on December 1, 1973:[11]

"a. The rule helped to maintain intact most of the pre-existing national distribution

11 Affidavit of John Vernon, Associate Assistant Administrator for Fuels Management, Office of Operations, Regulations and Compliance of FEA.

system for domestic crude oil, which was threatening to disintegrate during the last quarter of 1973. Since most domestic crude oil contracts were year-long contracts which would not terminate until after December 31, 1973, maintaining supplier/purchaser relationships as of December 1, 1973, would preserve and stabilize most of the nation's crude oil distribution system during a period when the potential for disorder was at its peak.

"b. The second major reason for the December 1 rule was that it established a floor upon which the crude oil allocation program (the 'buy-sell' list) could be built. The 'buy-sell' list depended upon each refiner being able to estimate its own crude oil availability for a three-month period. In order to make these estimates meaningful, it was necessary to stabilize as much of the existing crude flow as possible so that refiners would have a definite point of reference from which to measure the extent of their shortage. Without maintaining existing supplier/purchaser relationships, it would have been virtually impossible to make the estimates upon which the 'buy-sell' allocation program depended. Moreover, the December 1 rule enabled FEA to minimize the amount of crude oil that had to be allocated through forced sales under the buy-sell list by preventing crude supply imbalances among refiners from worsening during the critical start-up of the mandatory allocation program.

"c. The third principal reason for the December 1 rule was that it preserved access by independent and small refiners to price-controlled domestic crude oil. Without this rule, many small and independent refiners could have been supplanted or cut off by major integrated refiners. The December 1 rule was thus designed to meet the statutory objective of Section 4(b)(1)(F) to provide for 'equitable distribution of crude oil . . . at equitable prices among all . . . sectors of the petroleum industry, including independent refiners [and] small refiners . . .' "

A recent case, Exxon Corp. v. Federal Energy Office, et al. (D.D.C. No. 74-921, July 17, 1974), supplies warranted emphasis to related considerations, ignored in plaintiffs' arguments. The duty imposed upon a major supplier by the December 1/buy-sell regulations was attacked by a major supplier, which sought to avoid the requirements of selling to small and independent refiners 130,000 barrels of crude per day under the December 1 regulation or 95,000 barrels under the buy-sell regulation. An injunction against the enforcement of the regulations was denied by the district court, which observed, among other things:

". . . The December 1 Regulation was implemented to continue supplier/purchaser relationships existing on December 1, 1974, [sic] within the whole petroleum industry and prevent a disruption in the existing distribution system for domestic crude oil. The December 1 Regulation, furthermore, was im-

> plemented to assure small and independent refiners continued access to lower-cost domestic crude oil. The December 1 Regulation, furthermore, was implemented to provide a foundation upon which a mandatory allocation program could be implemented by the FEA.
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> "The Buy/Sell Regulation provides for allocation of crude oil solely among refiners . . . to assure adequate supplies of crude oil for all refiners who were experiencing deficiencies of crude oil during that period of time . . . The refiners who are eligible to purchase crude oil under the current Buy/Sell Regulation are only those refiners who fall within the definition of a small or independent refiner under Section 3 of the Petroleum Act."

See also Gulf Oil Corporation v. Simon, 502 F.2d 1154 (TECA 1974).

The record indicates that the reasons for the program, of which the December 1 regulation is only a part, are continuing ones.[12] And there may be gathered from the allocation plan as a whole the rational bases both of the agency's denial of any controlling effect of options or other "consents antedating December 1, 1973" and the exception dealing with subsequent consents. It is reasonable to suppose that the latter do not

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12 The basic Act initially was scheduled to expire February 28, 1975; this date has since been postponed to August 31, 1975. Pub. L. No. 93-511, 88 Stat. 1608 (Dec. 5, 1974).

threaten the program, controlled as they are by the continuing interest of major suppliers in maintaining their sources for meeting their own continuing obligations to independent or small refiners. Nor do we believe the regulation reasonably can be attacked here as one mandating production rather than regulating disposition, as Condor suggests. The subject of the Remedial Order was the disposition of produced oil as between the alternatives of sale to Phillips pursuant to the existing relationship, or taking in kind.

IV. THE REGULATION CONSTITUTES A RATIONAL EXERCISE OF DELEGATED POWERS.

We are of the view not only that Congress had the power to grant authority to the President and his delegates within the guidelines of the Act to pursue the objectives enumerated, but that the regulation in question, as a part of the entire plan, was a rational exercise of that power. "The national Government has the power to do what is needful for the great national purposes that identify this country's adjustments to change and ultimately survival." Amalgamated Meat Cutters & Butcher Work. v. Connally, 337 F. Supp. 737, 752 (D.D.C. 1971). "We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968).

Where the obvious intent of Congress is to give the President and his delegates broad power to do what

reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.

The urgency of the challenge confronting the agency upon the passage of the Emergency Petroleum Allocation Act already has been recognized. Reeves v. Simon, ___ F.2d ___ (TECA No. 9-18, Nov. 27, 1974); People of State of California, State Lands Com'n v. Simon, 504 F.2d 430 (TECA 1974); Mandel v. Simon, 493 F.2d 1239 (TECA 1974).

Exercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceedingly complicated undertakings. The petroleum industry itself is a complicated one. By reason of its intimate and convoluted relationship with the whole economy of the country it also tends to take upon itself the myriad problems besetting marketing and business activities generally. It would be the height of folly and grievously incompatible with the rule of deference, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); People of State of California, State Lands Com'n v. Simon, 504 F.2d 430 (TECA 1974), *supra*; Pacific Coast Meat Job. Ass'n, Inc. v. Cost of Living Coun., 481 F.2d 1388 (TECA 1973); University of Southern Cal. v. Cost of Living Council, 472 F.2d 1065 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973); *Mandel* and *Reeves*, *supra*, myopically to

"solve" these problems solely on the basis of Condor's situation or by the court's off-hand ideas of regulatory alternatives differing from the rational approach set by the agency.

The party attacking a regulatory scheme must carry the burden of persuasion. Bowles v. Willingham, 321 U.S. 503 (1944); American Nursing Home Ass'n v. Cost of Living Council, 497 F.2d 909 (TECA 1974). Neither the regulation nor the interpretation and enforcement of it as encompassed in the Remedial Order has been shown to be irrational, arbitrary, carpicious or beyond the powers delegated. Consequently, accepting the interpretation of the agency, we reach the constitutional issue certified to this court.

V. THE REGULATION AND THE REMEDIAL ORDER ARE NOT SHOWN TO BE UNCONSTITUTIONAL.

Plaintiffs say that historically ". . . until January, 1974 the Congress, legislatures and those to whom they have delegated their functions, have confined their exercise of power over private property to the exercise of the power of eminent domain, and to solely negative influences in limiting, restricting, inhibiting or prohibiting the use or disposition of private property." Plaintiffs see it as significantly different for ". . . Congress simply to come right out and tell the people what they positively must do with their property, rather than merely tell them what they cannot do with it." We find it unnecessary to discuss in detail the array of cases Condor has marshalled in an attempt to demonstrate that "affirmative" requirements beyond

the reach of the power of eminent domain, unlike "negative" restrictions within the police power, are constitutionally unacceptable.[13]

Even though the distinction sought to be drawn between negative and affirmative requirements were not in the context of this case simply that, rather than representing some real difference, we think that Block v. Hirsh, 256 U.S. 135 (1921), is controlling against Condor's contention here. This case upheld the requirement of an emergency rental control measure that tenants be permitted to continue to occupy leased premises upon expiration of their leases and demonstrates that the affirmative requirement of a continued relationship for the benefit of another may be constitutionally acceptable even though property

13 We find them either not in point, superceded in application by the flow of modern authority, or not inconsistent in principle with the validity of the regulation. They range in dates from 1829 to 1937 and involve such matters as a requirement of a municipality that a railroad company permit use of its property for a public cab stand without compensation, the railroad's uncompensated furnishing of an underpass for a private individual, taxation for private purposes, the provision by a railroad company of siding tracks and services to private individuals without a preliminary hearing and without compensation, the similar requirement of weighing scales under specified circumstances, the issuance of private bonds for private donations, unreasonable railroad rates, the seizing of private property in Puerto Rico by a military governor in reliance upon claimed power in excess of that delegated to him by the President, building line regulations issued by a municipality by reason of a two-thirds vote of property owners in the area, the licensing of securities dealers which now contrary to the holding relied upon is generally regarded as constitutional, and cases recognizing that Fifth and Fourteenth Amendment rights to property include generally the right to acquire, use and dispose of it. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), another case cited, upheld levy of an assessment by an irrigation district with the statement, "It is obvious . . . that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."

rights must be temporarily surrendered in the process, i.e., an interest in land for a substantial term. There, as in the present case, the complaining party was assured of compensation based upon administratively determined "reasonable" prices for the controlled property. Mr. Justice Holmes for the court faced and answered "[t]he main point against the law . . . that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the Act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down." (256 U.S. at 157). Mr. Chief Justice Hughes later stated for the court in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 440 (1934), with reference to the doctrine of *Block:*

> "Whatever doubt there may have been that the protective power of the state, its police power, may be exercised — without violating the true intent of the provisions of the Federal Constitution — in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. Block v. Hirsh, 256 U.S. 135 . . . Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 . . ."

Condor has attempted to distinguish *Block* from the present case but the distinction it seeks to draw rests

upon misconceptions of both.[14] That *Block* has continued viability is indicated by frequent reference to it in the current cases, including quotation of a brief extract in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). A decision most strongly relied upon by Condor during oral argument and referred to again in its supplemental statement, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935), has been questioned as being at variance with the tenor of modern authority.[15] In any event, we do not regard it as in point. Far from *Block's* representing an aberrant application, its principle has been applied to a variety of analogous situations.

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14 When during oral argument the court mentioned *Block*, not cited in the briefs, counsel asked for leave to file a response after study. They now have stated in such response among other things:

"We have no quarrel with the holding of *Block* because it is conceded in this case that if Plaintiffs wanted to and did sell their crude oil, they would, and could be required to, sell to Phillips, their traditional purchaser, at the FEA control price, just as the *Block* legislation required that if premises are to be rented they must be rented to the tenant in possession at the rent control rent, if the tenant wants to so rent it. Our quarrel is with the position that Plaintiffs must sell their crude oil even though they want to keep it and use it and not sell it to anyone."

In actuality the exception to the statute involved in *Block* was not based upon general "use" by the owner but only his possession "for actual and bona fide occupancy by himself, or his wife, children or dependents." All different use, or non-use, had to yield to a continuation of the relationship of landlord and tenant. In the present case Condor's desired "use" of its oil production is in no sense such a personal one, but involves processing by, and sale of the product to, others in the stream of commerce. Nor was *Block* narrowly decided with reference to the personal occupancy exception.

15 ". . . [W]e believe the cases cited by appellants are not controlling on the facts before us. See Mandeville Island Farms v. American C.S. Co., 1948, 334 U.S. 219 . . . where Mr. Justice Rutledge, speaking for the majority of the Court, listed the Alton case as one 'foredoomed to reversal'; although the formal reversal has not yet taken place." Wicks v. Southern Pacific Co., 231 F.2d 130, 137, n. 11 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956). See also Wickard v. Filburn, 317 U.S. 111, 121-122 (1942).

It has long been recognized that the Fifth Amendment prohibitions against the taking of property for public use without just compensation or due process of law refers only to direct appropriation and not to consequential injuries resulting from the exercise of lawful regulations. Bowles v. Willingham, 321 U.S. 503 (1944), *supra;* Knox v. Lee, 12 Wall. 457, 79 U.S. 457 (1871); Western States Meat Packers Ass'n, Inc. v. Dunlop, 482 F.2d 1401 (TECA 1973); Local Union No. 11, Int. Bro. of Electrical Wkrs. v. Boldt, 481 F.2d 1392 (TECA), *cert. denied,* 414 U.S. 1092 (1973); Wilson v. Brown, 137 F.2d 348 (Em. Ct. App. 1943), *supra.*

A reasoned decision for the temporary suspension of usual ownership prerogatives based upon broad national needs does not constitute necessarily an unconstitutional taking; and the issue of whether it does properly turns upon the circumstances of each case. U.S. v. Central Eureka Mining Co., 357 U.S. 155 (1958). The regulation of future action based on rights previously acquired by the person regulated is not per se prohibited by the constitution. Fleming v. Rhodes, 331 U.S. 100 (1947). Reasonable and practical regulations which are generally fair and equitable, although not necessarily so as applied to a particular person, are not unconstitutional when general regulations are necessary to accomplish an appropriate congressional purpose. Bowles v. Willingham, 321 U.S. 503 (1944), *supra;* Wilson v. Brown, 137 F.2d 348 (Em. Ct. App. 1943). Condor considers only its own situation. But agency orders are not to be read in a vacuum but rather must be interpreted in the entire context in which they arise. Bell Telephone Company of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974).

The effect of invalidating the administrative action here would be far-reaching. The authority of the FEA, or its counterpart under any future stabilization plan, to cope with an energy crisis on the basis of a coordinated and balanced plan could be rendered questionable indeed. Essential powers of government to meet this or other crises in perilous times would be frustrated by the adoption of an excessively rigid and unprecedented construction inhospitable to broad realities. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Block v. Hirsh, 256 U.S. 135, 157 (1921), *supra*.[16] Whether the challenged regulation and enforcement order would pass muster as a long continuing response to chronic energy problems need not be decided. Nor may this opinion be interpreted out of context as passing on the validity or invalidity of other FEA regulations not directly involved here.

The wording of the question certified to this court assumed certain effects in disregard of the far more than counterbalancing considerations mentioned above. But having satisfied ourselves of the propriety of exercising jurisdiction based upon that certification of what essentially is a substantial constitutional question, we hold that the December 1 regulation was incorrectly interpreted by the district court, that there is no showing in the record that Condor's con-

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16 Recently in similar vein the Supreme Court resolved far-reaching issues in the context of "[a] rail transportation crisis seriously threatening the national welfare . . .", over the minority objection that while an "emergency often gives Congress the occasion to act . . . no emergency . . . permits it [Congress] to disregard the Just Compensation Clause of the Fifth Amendment . . ." Regional Rail Reorganization Act Cases. ___ U.S. ___ (Dec. 16, 1974).

stitutional rights are violated by the Remedial Order, and that the district court erred in enjoining the enforcement of that order.

For the reasons indicated the order of preliminary injunction is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

APPENDIX "D"

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BEFORE HONORABLE A. SHERMAN CHRISTENSEN, HONORABLE JOE EWING ESTES AND HONORABLE FRANK M. JOHNSON, JR., JUDGES

Condor Operating Company, et al.,
Plaintiffs-Appellees,

versus Nos. 5-10 and 5-11

John C. Sawhill, Administrator, Federal Energy Administration, et al.,
Defendants-Appellants.

This cause came on to be heard on the record on appeal for the United States District Court for the Western District of Texas, Midland-Odessa Division and was argued by counsel.

In consideration whereof,

IT IS ORDERED that the order of preliminary injunction is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

FOR THE COURT:
Thomas R. Napton
Clerk
/s/ RUTH H. JACOBSON
Deputy Clerk

February 7, 1975

District Court Docket No. MO 74 CA 77

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1117

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL, AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST, PETITIONERS

v.

FRANK G. ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A) is not reported. The opinion of the Temporary Emergency Court of Appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 7, 1975. The petition for a writ of certiorari was filed on March 6, 1975. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 750, 87 Stat. 27, and 28 U.S.C. 1254(1).[1]

[1]See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633, incorporating Section 211(g) of the Economic Stabilization Act by reference.

QUESTION PRESENTED

Federal Energy Office (F.E.O.)[2] Regulation 10 C.F.R. 211.63(a)[3] requires that all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of the F.E.A.'s regulatory progam. The question presented is:

Whether F.E.A.'s regulation 211.63(a) requiring the maintenance of a December 1, 1973 supplier/purchaser relationship for the sale of domestic crude oil contravenes a supplier's due process rights under the Fifth Amendment to the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant regulation at issue is 10 C.F.R. 211.63 (a), which is set forth at Pet. 4. The F.E.A.'s clarifying amendment to Section 211.63(a)[4] is set forth in the Appendix to this brief in opposition

STATEMENT

Petitioners seek review of a decision by the Temporary Emergency Court of Appeals upholding the constitutionality of F.E.A.'s Mandatory Petroleum Allocation and Price Regulation (10 C.F.R. 211.63(a)) requiring the maintenance of supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil as they existed on December 1, 1973 (Pet. 4).

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[2]The F.E.O. became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, *et seq.*, 15 U.S.C. 761, *et seq.*, and hereafter will be referred to as F.E.A.

[3]Section 211.63(a) (39 Fed. Reg. 35525, October 1, 1974) was originally promulgated as 211.64(a) and published in the Federal Register on January 15, 1974 at 39 Fed. Reg. 1939. The regulation will be hereafter referred to as 211.63(a).

[4]The clarifying language in the January 30, 1974 Federal Register refers to the F.E.A. regulation at issue here as Section 211.64 since that regulation did not become 211.63 until its renumbering and republication on October 1, 1974.

In the fall of 1973 in response to existing and impending nation-wide petroleum shortages, caused in part by the Arab oil embargo, Congress enacted the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627. The shortages were found to have created or to be likely to create "severe economic dislocations and hardships" which would "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare * * * " (87 Stat. 628).

The President or his delegate was authorized to promulgate regulations to provide "to the maximum extent practicable" for, among other things, the allocation of crude oil to permit the operation of refineries at full capacity and the equitable distribution of crude oil among regions of the country and sectors of the petroleum industry (87 Stat. 629-630).

F.E.A., pursuant to the Congressional mandate, promulgated Section 211.63(a) as part of its mandatory allocation regulations specifically to prevent alteration of any domestic crude oil supplier/purchaser relationships which existed on December 1, 1973. Subsequently, on January 28, 1974, the F.E.A. added a clarifying amendment (39 Fed. Reg. 3908, January 30, 1974) to the regulation at issue here establishing that it is the supplier/purchaser relationships in effect under contracts rather than the contracts themselves which are to remain in effect for the duration of the regulatory program (App., *infra*).

Petitioners are members of a joint venture that, together with other parties including Phillips Petroleum Company, owns undivided interests in oil and gas leases in Ector County, Texas. The operating agreement concerning the leases provides that owners shall have the right either to take their shares of production in kind or to sell them (Pet. App. C 13a).

From 1959 through April, 1974 (*i.e.*, including December 1, 1973), the petitioners sold their full share of crude oil production to Phillips Petroleum Company. Then, determining that their profits would be higher if they refined their own crude oil, petitioners began to exercise the option in the operating agreement which permitted any party to take his share of production in kind at any time (Pet. App. C 13a-14a).

On August 12, 1974, F.E.A. issued a Remedial Order to Condor Operating Company requiring maintenance of the December 1 supplier/purchaser relationship with Phillips Petroleum as required by Section 211.63(a) of the agency regulations. Petitioners filed suit in the district court seeking to enjoin enforcement of the F.E.A. Remedial Order. The district court issued its order on September 26, 1974 preliminarily enjoining the F.E.A. from enforcing the Remedial Order. Furthermore, the district court held that if its construction of Section 211.63(a) was incorrect, a substantial constitutional issue existed requiring resolution by the Temporary Emergency Court of Appeals. The October 3, 1974 certification by the district court to the court of appeals resulted in resolution of both constitutional and non-constitutional issues, as permitted by Section 5(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633.

The Temporary Emergency Court of Appeals held that Section 211.63(a) has a rational basis and constitutes an integral part of F.E.A.'s regulatory program. The court found that Section 211.63(a) precludes the petitioners from exercising their contractual option to take their crude oil production in kind, and that the regulation does not unconstitutionally deprive petitioners of their property without just compensation or without due process of law.

ARGUMENT

1. Petitioners contend (Pet. 15) that Section 211.63(a) contravenes the due process clause of the Fifth Amendment because it deprives them of their option to take their share of crude oil production in kind. Petitioners concede (Pet. 9) that they could be lawfully restricted to sales to historical purchasers and that F.E.A. may lawfully regulate the volume of crude oil produced and the price at which it is sold. But petitioners maintain (Pet. 11) that an owner of property cannot be compelled to sell against his will.

The court of appeals, relying on this Court's decision in *Block* v. *Hirsh,* 256 U.S. 135, properly rejected this claim. In *Block,* the constitutionality of an emergency rent control provision that permitted tenants to continue in possession beyond the expiration of their leases was upheld. The temporary suspension of ownership prerogatives was justified by emergency conditions, and there, as in this case, owners were "assured of compensation based upon administratively determined 'reasonable' prices for the controlled property" (Pet. App. A 27a).

The principle of the *Block* decision—that the Constitution may authorize the prevention of "immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer" (*Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 440) is manifestly applicable here. See *Village of Belle Terre* v. *Boraas,* 416 U.S.1.

2.The court of appeals also properly rejected petitioners' non-constitutional challenge to the validity of Section 211.63(a). The court found that a regulation maintaining supplier/purchaser relationships as of December 1, 1973 served, consistent with the mandate of the Emergency Petroleum Allocation Act of 1973, to pre-

serve and stabilize the nation's crude oil distribution system at a time when there was maximum potential for disorder, and thus is not irrational, arbitrary, capricious or beyond the powers delegated by Congress (Pet. App. C 19a-21a, 23a-25a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

WILLIAM KANTER,
STANLEY D. ROSE,
MARVIN L. COAN,
Attorneys.

APRIL 1975..

APPENDIX

Federal Energy Office clarifying amendment to 10 C.F.R. Section 211.64(a), 39 Fed. Reg. 3908, January 30, 1974.

Title 10—Energy
CHAPTER II—FEDERAL ENERGY OFFICE
PART 211—MANDATORY PETROLEUM ALLOCATION REGULATIONS
Allocation of Crude Oil

Subpart C of the Mandatory Allocation Regulations, concerning the allocation of crude oil, is amended in several respects to clarify certain aspects of that program. The amendments involve clarification of exemptions, definitions, reporting rules and the guidelines for sales relationships in crude oil allocation.

The scope section, § 211.61(a) is revised in an effort to clear up a misconception that "stripper well" crude is not subject to allocation at the refinery level. Under the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, only the first sale of such crude oil is free from control. Any subsequent sale, such as one made by the first transferee, is subject to control. Accordingly, the language of § 211.61 is adjusted to make this clear. A further amendment to Part 210 will also be issued soon to clarify that, in the case of the integrated producer and refiner, the "first sale" is deemed to occur at the transfer point where a value is established for purposes of computing the income tax depletion allowance.

Other changes involve the deletion of the separate definition of "refiner" in § 211.62. In computing the first refiners' buy-sell list issued on January 18, 1974 (39 FR 2522) it was not feasible to treat persons other than refiners who own or purchase crude oil for processing as refiners. Therefore, the prior definition of "refiner" is deleted and the general definition of "refiner" stated in §211.51 of Subpart B fully applies to Subpart C. This amendment now conforms the definition of "refiner" with the definition used in the preparation of the buy-sell list. In accordance with this change of definition, § 211.65(g) has also been amended to clarify how crude oil processed under a processing agreement is to be treated in calculating supply capacity/ratios.

The definition of "refiner-buyer" has also been revised. After further consideration, it was determined that limiting the definition of a refiner-buyer to a refiner whose supply/capacity ratio is more than 0.02 below the national supply/capacity ratio is not desirable.

Therefore, as now defined, a refiner-buyer means any refiner whose supply-capacity ratio is below the national supply-capacity ratio and who is given the opportunity to purchase crude oil during a crude oil sales period. The definition of "refiner-seller" is also amended to clarify that this term refers to any refiner whose supply-capacity ratio is above the national supply-capacity ratio and who is required to sell crude oil pursuant to the operation of Subpart C.

Section 211.64 is amended to clarify that it is the supplier-purchaser relationship in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, rather than the contracts themselves which are to remain in effect for the duration of the program. Thus, if by the contractual terms, the relationship between the supplier and purchaser is altered after December 1, 1973, this change would not be allowed to occur except as otherwise provided in § 211.64(a)(1), (2), and (3), or in § 211.24.

A limitation has also been imposed on the amounts which a refiner-buyer may purchase from a refiner-seller by an amendment to § 211.65(i). A refiner-buyer may not now purchase a quantity of crude oil from a refiner-seller which, when added to the refiner-buyer's total crude oil supply will exceed 100 percent of the refiner-buyer's refining capacity.

Finally, changes have been made to the reporting requirements in § 211.66 to indicate that the amounts of crude oil processed by a refiner for a non-refiner must be reported as well as amounts of crude oil in excess of 1973 levels and crude oil produced from a stripper well lease.

Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum allocation rules and regulations, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 11345; Cost of Living Council Order 47, 39 FR 24)

In consideration of the foregoing, Part 211 of Chapter II, Title 10 of the Code of Federal Regulations is amended as set forth below, effective 11:59 p.m., January 14, 1974.

Issued in Washington, D.C., January 28, 1974.

JOHN C. SAWHILL,
Deputy Administrator,
Federal Energy Office.